DISCUSSION PAPER

ON THE

BUSINESS CORPORATIONS ACT

November 1999

Alberta Registries

Executive Summary

This paper is intended to initiate a consultation process to determine which sections of the Business Corporations Act may be in need of revision. Part One of the paper deals with prohibited financial assistance, directors' liability, proportionate liability, share capital issues and revival. Part Two deals with shareholder meetings outside Alberta, regulations regarding constrained shares, filing of Court Orders, deemed receipt rule, and Notice of Derivative Action Application.

The contents of this discussion paper include references to sections of the applicable legislation. Comments from selected stakeholders such as the Law Society of Alberta, Institute of Law Research and Reform, Industry Canada, and the Standing Senate Committee on Banking, Trade and Commerce are included. Questions are interspersed throughout the discussion paper.

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INTRODUCTION

In order to ensure the legislation's currency, Alberta Registries is initiating a consultation process to address components of the Act that may be in need of revision. It is hoped that the contents of this document will facilitate further consultation.

This paper is divided into two major parts. "Part One" addresses issues for discussion, including:

- Prohibited Financial Assistance
- Directors' Liability
- Proportionate Liability
- Share Capital Issues
- Revival

Part Two deals with Administrative Amendments, including:

- Shareholder Meetings Outside Alberta
- Regulations Regarding Constrained Shares
- Filing of Court Orders
- Deemed Receipt Rule
- Notice of Derivative Action Application

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Alberta Registries invites comments during this phase of the consultation process. This discussion paper and summary of questions are available on the Internet at www.gov.ab.ca/ma/reg/discussion1.htm

Please send your comments by February 28, 2000 either **electronically to discussionpapers@reg.gov.ab.ca** or via mail to:

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PART ONE - ISSUES FOR DISCUSSION

I. Prohibited Financial Assistance

A. Background

Section 42 seeks to protect creditors and minority shareholders by prohibiting corporations from making loans or giving guarantees to shareholders and related parties:

42(1) Except as permitted under subsection (2), a corporation shall not, directly or indirectly, give financial assistance by means of a loan, guarantee or otherwise

(a) to a shareholder or director of the corporation or of an affiliated corporation,

(b) to an associate of a shareholder or director of the corporation or of an affiliated corporation, or

(c) to any person for the purpose of or in connection with a purchase of a share issued or to be issued by the corporation or an affiliated corporation,

if there are reasonable grounds for believing that

(d) the corporation is, or after giving the financial assistance would be, unable to pay its liabilities as they become due, or

(e) the realizable value of the corporation's assets, excluding the amount of any financial assistance in the form of a loan or in the form of assets pledged or encumbered to secure a guarantee, after giving the financial assistance, would be less than the aggregate of the corporation's liabilities and stated capital of all classes.

(2) A corporation may give financial assistance by means of a loan, guarantee or otherwise

to any person in the ordinary course of business if the lending of money is part of the ordinary business of the corporation,

(b) to any person on account of expenditures incurred or to be incurred on behalf of the corporation,

(c) to a holding body corporate if the corporation is a wholly owned subsidiary of the holding body corporate,

(d) to a subsidiary body corporate of the corporation, or

(e) to employees of the corporation or any of its affiliates
(i) to enable or assist them to purchase or erect living

accommodation for their own occupation, or

(ii) in accordance with a plan for the purchase of shares of the corporation or any of its affiliates to be held by a trustee.

(3) A contract made by a corporation in contravention of this section (a) may be enforced by the corporation or by a lender for value in good faith without notice of the contravention.

(4) Unless disclosure is otherwise made by a corporation, a financial statement referred to in section 149(1)(a) shall contain the following information with respect to each case in which financial assistance is given by the corporation by way of loan, guarantee or otherwise, whether in contravention of this section or not, to any of the persons referred to in subsection (1)(a), (b) or (c), if the financial assistance was given during the financial year or period to which the statement relates or remains outstanding at the end of that financial year or period:

(a) the identity of the person to whom the financial assistance was given;

(b) the nature of the financial assistance given;

(c) the terms on which the financial assistance was given;

(d) the amount of the financial assistance initially given and the amount, if any, outstanding

This provision seeks to prohibit loans and guarantees made in relation to "related party" and "share purchase" transactions.

Related party transactions occur when a corporation gives financial assistance to an individual or entity that is related to the corporation. This could include a loan to a director or a guarantee for an affiliate corporation. If these transactions were not restricted, directors could cause corporations to lend funds to directors and related parties, to the financial detriment of the corporation. This could have a negative impact on the claims of creditors and minority shareholders who have no effective voice as to how the corporation should be managed.

Share purchase transactions, which are also the subject of s. 42-type provisions, are more popularly described as "leveraged buy-outs" ("LBO"). A basic LBO involves the following sequence of transactions:

- A borrows short-term funds from a third party.
- A uses these funds to purchase a controlling share of B Ltd.
- A appoints directors to B Ltd.
- A's nominees cause B Ltd. to lend money to A.
- A uses this money to pay off the loan from the third party.

The result of this sequence is that B Ltd. is financing the acquisition of its own shares. Section 42 and its predecessors have long sought to block these transactions out of concern for creditor and shareholder rights.

B. Problems with Section 42

Section 42 has apparently become an obstacle to legitimate transactions and it is not fulfilling its initial purpose. The Alberta Law Reform Institute ("ALRI") on this matter[1] highlighted some of the major problems that practitioners have experienced with s. 42. The section often prevents a corporation from lending to related entities or securing loans made to the entity by third parties. This makes it difficult to obtain loans from third parties and to restructure corporations, even when it is in the best interests of the corporations to do so.

The solvency and asset tests are another major source of problems. Industry Canada[2] has raised the point that there is no definition of "realizable value." There is also uncertainty as to what should be included as a liability. Contingent liabilities are particularly problematic. How likely must it be that a creditor will realize on security before it should be included as a liability? Accountants are often unwilling to give an opinion as to the value or solvency of a corporation with these outstanding ambiguities.

The problems with s. 42 prevent business people from undertaking beneficial transactions. The uncertainties created by s. 42 raise transaction costs, which create an impediment to otherwise viable projects. How can s. 42 be amended to address these problems? Are these costs reasonable in relation to the protection s. 42 affords to shareholders and creditors?

C. Previous Proposals

The unique aspects of the four proposals are discussed below. The chart compares these proposals in greater detail.

1. Alberta Law Reform Institute - 1987 Discussion Paper

The ALRI recommended a new mechanism to fulfill the existing objectives and were influenced by the distinction between distributing and non-distributing corporations. They proposed a permissive approach to non-distributing corporations. All types of loans should be permitted, as long as they are disclosed and the corporation is solvent, based on a reasonableness test.

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[1] Institute of Law Research and Reform, *Financial Assistance by a Corporation: Section 42, The Business Corporations Act (Alberta)*, Final Report No. 54 (Edmonton: August 1989)

[2] Industry Canada, *Financial Assistance and Related Provisions*, (Ottawa: March 1996)

The ALRI recommended a divided approach with respect to distributing corporations. For related party loans, they supported an absolute prohibition, subject to specific exceptions. The *Securities Act* should deal with share purchase loans.

2. *Alberta Law Reform Institute - 1989 Final Report*

The 1987 proposals apparently did not address the needs of practitioners who favored the status quo or the repeal of s. 42 altogether. As a result, the ALRI published a final report on this topic in 1989[3] that addressed whether other remedies available to creditors and minority shareholders were sufficient to safely allow the repeal of s. 42. They recommended that s. 42 be repealed, subject to some conditions.

3. *Industry Canada - March 1996 Discussion Paper*

In March 1996, Industry Canada published a discussion paper[4] in relation to s. 44 of the *Canada Business Corporations Act* ("CBCA"), which is very similar to BCA s. 42. It sought to change the operation of the provision while preserving its object, as did the 1987 ALRI proposals.

The Industry Canada proposals were based on the type of transaction in issue. They would permit related party loans that pass a three-part test, which includes a "best interests of the corporation" assessment. They would also require that distributing corporations have an independent committee of directors to review all such transactions. A "best interests" test might be theoretically better than the ALRI approach but it might create great uncertainty. It also might be too demanding to expect a closely held and solvent company to ensure it complies with these requirements.

Industry Canada took a different approach for share purchase transactions. They recommended that a solvency test be used but they suggested many ways that the current test could be clarified. For example, accountants are not comfortable in giving solvency opinions based on "realizable value" so Industry Canada recommended that the term be changed to "fair value" and that a definition of the term be included in the Act. The paper makes several other recommendations that might add certainty to the solvency test.

4. *Law Society of Alberta - September 1996 Recommendations*

The Corporate and Commercial Advisory Committee to the Law Society of Alberta ("Law Society") made recommendations in respect of s. 42. Although a minority on the committee apparently supported the ALRI's

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[3] *supra*, note 2.

[4] *supra*, note 3.

1989 proposals, the majority adopted its own list of practical changes designed to resolve the major problems with the provision.

The unique aspect of the Law Society recommendations was that they took the view that the primary purpose of s. 42 is or should be to protect shareholders, not creditors. They believed that creditors are always at risk and that the onus should be on them to protect themselves by imposing conditions on their loans. This position makes it much easier to address the problems with s. 42.

They made several recommendations that they believed would resolve the major problems encountered by practitioners. In their view, the most important of these or:

- To permit financial assistance if there is unanimous shareholder consent
- To protect the contractual rights of third parties
- To protect directors against common law liability if the transaction passes s. 42.

Their other recommendations are summarized in the chart on the next page. They also suggested that the accounting oriented proposals in this group be put in the regulations to make it easier for amendments to be made.

Questions For Feedback

1. ***Should one of the four proposals be implemented in its current form?***

2. ***Are there any new factors that should be considered that are not captured by these proposals?***

3. ***If there are any new factors, how should they be reflected in the proposed wording of s. 42?***

	Rule	Application	*Exceptions*	*Other*
ALRI (1987)				
Distrib (RP)	Absolute prohibition	1. director 2. directors' associates 3. corp 1/3 owned by dir & assoc. 4. dir of affiliate & their assoc. 5. sub of the corp **not** included	advances on expenses advances on salary employee housing share purch for emp	eliminate disclosure requirement
Distrib (SP)	Securities Act should address	n/a	-----	-----
Non-Distrib	Disallow if, "rsnble grounds that corp is or will be unable to meet liabilities generally as become due."	see above	none	disclosure w/in 90 days (related party) - to all s/h (share purchase) - to all unsecured creditors
General	-----	-----	-----	Amend s. 42(3) to protect lender rights regardless of notice
ALRI (1989)				
Non-Distrib	Repeal s. 42(1), (2) & (3)	n/a	n/a	Require disclosure of any F.A. w/in 90 days to all shareholders
Distributing	Repeal s. 42(1)(a) & (b) Repeal s. 42(1)(c) once ASA addresses share purchase trans.	n/a	n/a	Incorporate s. 42(4) disclosure requirements into s. 149
General	-----	-----	-----	Amend s. 231 to include creditors as complainants
IC (1995)				
RP	Permitted if, 1. best interests of corp 2. full disclosure 3. directors or s/h approve	Shareholders, directors, employees of the corp & its affiliates and their associates	none	Distributing corps must have committee of indep directors to review all transactions
SP	Permitted if pass, "clarified" solvency test		Members of wholly owned corp group not included in class	-----
General	-----	-----	-----	3ptys can enforce contracts if arm's length,good faith, no notice Full due diligence defence available to directors
LSA (1996)				
General	Permit if all s/h consent, otherwise same rule but clarify "liabilities" and "realizable value"	Associates incl c/l spouse apply tests at time commit to deal	42(2)(c) exemption should apply to corps that are wholly owned directly or indirectly & should let these subs give fa to individuals that own 100% of corp	Remove "stated capital" from (42(1)(d)) & "to be held by a trustee" from 42(2)(e)(ii) Protect rights of lenders if pass s. 42, no c/l liability

II. Directors' Liability

A. Directorless Corporations

There have been cases where all of the directors of financially troubled corporations have resigned to avoid personal liability. These corporations have continued to operate, notwithstanding that they are violating s. 97(2):

> ***97 (2) A corporation shall have one or more directors but a distributing corporation shall have not fewer than 3 directors, at least 2 of whom are not officers or employees of the corporation or its affiliates***

It is often in the best interests of the corporation to continue operating and, ideally, to have directors. The problem appears to be that when a corporation is insolvent and most in need of directors, there is also the greatest incentive for directors to resign.

There seems to be a general consensus that directorless corporations are at least partially a symptom of the liability being imposed on directors. This may necessitate a review of the entire scheme of director liability. Before that is addressed, there are several intermediate steps that could be taken to limit the use of directorless corporations. The Law Society generated many of the following suggestions:

1. Dissolution Power

The Registrar could have the right to dissolve directorless corporations. A problem with this option is that it might harm stakeholders if there is any value in the corporation as a going concern. Furthermore, others have noted that an "interested person" may apply via s. 234 to have a court order a corporation to be dissolved if it is equitable to do so.
As a result, there may not be a need to give this power to the Registrar.

2. Modified Dissolution Power

A variation on the dissolution option is to give the Registrar the power to dissolve in six months time, unless the corporation shows to a court that it would be unjust to do so. Alternatively, the Registrar could have the right to automatically dissolve a corporation unless the corporation obtained a court order to prevent such action on equitable grounds.

3. Broaden Definition of "Director"

The Act could follow the Ontario approach of broadening the definition of director. The Ontario BCA treats anyone who participates in the management of the corporation as a director. It excludes officers, professional service providers and receivers or trustees. The Industry

Canada paper[5] on this topic has recommended that the CBCA follow this approach.

4. Appoint "Protectors"

The dilemma of directors resigning when they are most needed might be resolved by allowing for the appointment of "protectors" who would act as directors but would not assume the liability of directors. This would require that the definition of director be narrowed in the BCA. One problem with this option is that it might be ineffective as against the *Income Tax Act*, which applies equally to "defacto" and regular directors.

5. Limit Actions of Directorless Corporations

A fifth option is to expand BCA s. 110(3) and s. 116(a), which limit the actions of a directorless corporation. For example, the use of directorless corporations might be reduced by limiting their ability to approve their officers' salaries.

6. Expand Remedies Against Directorless Corporations

An alternative approach is to give interested parties more rights as against directorless corporations. Section 207 could be expanded to apply to shareholders and s. 234(3)(n) could be expanded to apply to "interested persons":

> ***207 (1) The Court may order the liquidation and dissolution of a corporation or any of its affiliated corporations...***
> ***234 A complainant may apply to the Court for an order (of relief by the Court on the ground of oppression or unfairness) under this section***
> ***(3) In connection with an application under this section, the Court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:***
> ***(n) an order for the liquidation and dissolution of the corporation .***

This would enable these parties to apply to a court to have an inoperative and directorless corporation dissolved.

B. General Reform of Directors' Liability

Some practitioners feel that there has been a trend toward increased director liability. This has allegedly made it difficult for corporations to attract well-qualified directors. Two papers have explored the need for reform of directors' liability. The ALRI and Industry Canada have both published discussion papers on this topic.

1. Alberta Law Reform Institute - 1989[6]

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[5] Industry Canada, *Canada Business Corporations Act Discussion Paper: Proposals for Technical Amendments*. (Ottawa: September 1995).

This paper focused its discussion on the fiduciary and competency duties owed by directors to corporations by virtue of s. 117:

> ***117 Every director and officer of a corporation in exercising his powers and discharging his duties shall***
> ***(a) act honestly and in good faith with a view to the best interests of the corporation, and***
> ***(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances***

It attributed suggestions that there had been a trend toward higher standards being imposed on directors to the American case of *Smith* v. *Van Gorkom*[7]. It did not report any evidence that this case had affected the standard of care being imposed on directors in Canada. The paper did note that this case is generally thought to be the cause of higher premiums for directors' and officers' liability insurance in both Canada and the United States.

The paper discussed American efforts to reduce common law directors' liability standards. Apparently, American jurisdictions have altered common law standards by explicitly softening statutory duties or by permitting corporations to limit director liability in their articles. Similarly, they have allowed caps on damages that are available against directors.

The paper did not recommend using any of these techniques to reduce directors' liability in Alberta. The ALRI recommended that three factors be considered before further action is taken in this regard:

> (a) Canadian judicial and legislative developments,
> (b) Availability of D&O insurance and,
> (c) Willingness of Albertans to serve as directors

2. Other Proposals

Many of the following proposals are based on a 1995 Industry Canada paper[8], which reviewed CBCA provisions affecting directors' liability:

(a) Liability for Employee Debts

Section 114, which imposes liability on directors for employee wages, could be repealed:

> ***114(1) Directors of a corporation are jointly and severally liable to employees of the corporation for all debts not exceeding 6 months wages***
> ***payable to each employee for services performed for the corporation while***

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[6] Institute of Law Research and Reform, *Corporate Directors' Liability.* Research Paper No. 17. (Edmonton: February 1989).

[7] 488 A. 2d 858 (1985) (Del. S.C.)

[8] Industry Canada, *CBCA Discussion Paper: Directors' Liability.* (Ottawa: November 1995).

they are directors.

(2) Subsection (1) does not render a director liable for debts for wages

(a) if he believes on reasonable grounds that the corporation can pay the debts as they become due, or

(b) if the debts are payable to employees for services performed while the property of the corporation is under the control of a receiver, receiver-manager or liquidator.

Section 112 of the *Employment Standards Code* provides the same protection to employees within a complete code that deals with all employment issues.

Section 114 is also ambiguous with respect to whether directors are liable for non-wage employee debts, such as severance and termination pay. Furthermore, it is not clear whether director liability for all debts is capped at six months wages or whether that is only the limit on director liability for wages. Do these issues need to be addressed?

(b) Indemnification Provisions

The Industry Canada paper also raised several concerns that would appear to be relevant to s. 119. There may be a need to broaden the availability of indemnification or to permit defense costs to be advanced to directors.

Some apparent inconsistencies were identified in s. 119. In certain circumstances, directors are required to act in the best interests of the body corporate of which they are a director and the nominee corporation that indemnifies them. Are practitioners encountering these or similar problems with BCA s. 119? Is there a need to amend this provision?

(c) General Proposals

It has been suggested that the phrase "best interests of the corporation" should be defined in the Act. Perhaps the BCA should only require that "the best interests of the corporation" be one's "dominant or primary purpose."

Other proposals include only imposing liability on inside directors who have personally benefited from the impugned conduct, expanding the s. 118(3) due diligence defense and allowing for damages:

118 (1) A director who is present at a meeting of directors or committee of directors is deemed to have consented to any resolution passed or action taken at the meeting unless...

(3) A director is not liable under section 113 or 117 if he relies in good faith on
(a) financial statements of the corporation represented to him by an officer of the corporation or in a written report of the auditor of the corporation fairly to reflect the financial condition of the corporation, or
(b) and opinion or report of a lawyer, accountant, engineer, appraiser or other person whose profession lends credibility to a statement made by him.

Questions For Feedback

4. ***Are the duties imposed on directors too onerous? Has this made it difficult for corporations to attract directors and obtain directors' liability coverage?***

5. ***Have any problems arisen with wage liability of indemnification provisions?***

6. ***Are there any other concerns with director liability that need to be addressed?***

7. ***Do you have any suggestions for wording of the relevant sections?***

III. Proportionate Liability

Alberta Registries is considering BCA amendments to address the liability of those who provide financial information that is required by the Act. This issue has been the subject of detailed study by the Federal Government, in relation to the CBCA.

A. Background

In 1995, the Standing Senate Committee on Banking Trade and Commerce ("Senate Committee") began considering whether the CBCA and other federal legislation should be amended to change the principle of joint and several liability as it applies to those who provide financial information. The Senate Committee undertook a very detailed review of the issue, with the assistance of in-depth consultation with stakeholders.

The impetus for the proposed reform was the concern that joint and several liability unfairly apportioned liability between co-defendants. Joint and several liability implies that a defendant who is only partially at fault may be liable for the full amount of a plaintiff's loss. This system fully compensates plaintiffs by imposing the burden of insolvent co-defendants on the defendant who has the greatest capacity to pay.

Many stakeholders favored a proportionate liability system whereby individuals who provide financial information would only be liable in proportion to their degree of fault. This system accurately allocates liability between defendants by imposing the burden of insolvent co-defendants on a plaintiff who may or may not have the capacity to absorb the loss.

The key issue that emerges from the Senate Committee reports is the matter of who should bear the burden of insolvent co-defendants. Joint and several liability places the entire burden on the defendants, whereas proportionate liability imposes this loss on the plaintiff. The Senate Committee sought to design a new liability regime that would more fairly allocate this burden between the parties.

B. Federal Proposal

The result of the Senate Committee's analysis is a proposal to create a system of "modified proportionate liability." This proposal is expected to be incorporated into a Bill to be tabled in the fall of 1999. The new regime is proposed to apply to

> *claims for financial loss arising by means of an error, omission, statement or misstatement in financial information issued under, or contained in a document issued under, the Canada Business Corporations Act, the Bank Act, the Insurance Companies Act, the Trust and Loan Companies Act, the Cooperative Credit Associations Act, the Canada Cooperative Associations Act, and the Canada Cooperatives Act.*[9]

The new regime would only apply to "sophisticated investors", as identified by an "investment value" test. An investor would be "sophisticated" if the value of their investment at the relevant time was more than a prescribed amount (currently proposed to be $20,000). The existing joint and several liability system would continue to apply to the claims of unsophisticated investors and to defendants who knowingly or intentionally engaged in fraudulent or dishonest conduct.

Courts would retain the discretion to deem an individual with an investment value of more than the prescribed amount to be subject to joint and several liability, if it would be just and reasonable to do so. The individual plaintiff would bear the burden of showing that special treatment is warranted.

The claims of sophisticated investors would be subject to modified proportionate liability. Co-defendants would each be liable for the portion of the plaintiff's loss that corresponds to their degree of fault. In addition, they would be liable for the balance not collected from co-defendants in proportion to their degree of fault, up to a maximum of 50% of the available defendant's original liability.

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[9] Report of the Standing Senate Committee on Banking, Trade and Commerce, *Modified Proportionate Liability* (Ottawa: September 1998)

For example, a defendant who is 20% at fault for a $100,000 loss would be immediately liable for $20,000. They would also be liable for 20% of the amount that was not collected from other defendants up to a maximum of 50% of their original liability. Therefore, their maximum total liability would be $30,000. Under joint and several liability, the same defendant could be liable for the full $100,000.

The proposed system is designed to achieve a balance between joint and several liability and proportionate liability. Sophisticated investor plaintiffs, who are likely more able to absorb the burden of insolvent defendants, are required to share this burden with the defendants who are able to pay. Unsophisticated investor plaintiffs continue to be fully compensated to the extent that the financial capacity of any and all of the defendants permits.

C. Feedback

Alberta Registries is considering whether similar amendments should be undertaken in relation to the BCA. We invite comment as to whether this proposal should be pursued. The questions below may provide a starting point for this discussion.

Questions For Feedback

8. ***Has the threat of joint and several liability to those who provide financial information made it too difficult or expensive for Alberta businesses to obtain financial information?***

9. ***Is there value in maintaining uniformity between the CBCA and the ABCA, such that amendments should be pursued on that basis?***

10. ***Should joint and several liability be changed only insofar as it applies to plaintiffs who rely on financial information?***

11. ***If the liability regime that applies to the provision of financial information in Alberta were to be changed, would it be appropriate and/or effective to institute these changes via amendments to the BCA?***

IV. Share Capital Issues

A. Issue of Shares

Section 25 requires that:

> *25(1) Subject to the articles, the by-laws and any unanimous shareholder agreement and to section 28, shares may be issued at the times*
> *and to the persons and for the consideration that the directors determine.*

(2) Shares issued by a corporation are non-assessable and the holders are not liable to the corporation or to its creditors in respect of those shares.

(3) A share shall not be issued until the consideration for the share is fully paid in money or in property or past service that is not less in value than the fair equivalent of the money that the corporation would have received if the share had been issued for money.

This provision is problematic in relation to share splits. Typically, shares are split by canceling the outstanding shares of a particular class and issuing multiple shares to the same shareholders in exchange for their canceled shares. It could be argued that the canceled shares do no qualify as consideration for the new shares, such that s. 25 is violated.

Directors would like to be able to split shares by special resolution with the only consideration received being the canceled shares. There does not appear to be any policy reason to block this type of transaction. Is there a reason why one should have to give additional consideration for shares that are of no greater value than the canceled shares?

The Law Society has expressed concern that share splits may cause problems where there is more than one class of shares. A split could be used to increase the voting power of one class relative to another. Furthermore, if only one class is split and the dividends for any class are fixed as a per share amount, then dividends may be unfairly distributed. The alternative is to require that the articles be amended pursuant to s. 167(1)(f) to execute a share split. While this is a more formal course of action that might better protect minority shareholders, it also limits the corporation's flexibility:

167 (1) Subject to sections 170 and 171, the articles of a corporation made by special resolution be amended to
(f) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series or into the same or a different number of shares or other classes or series.

B. Designation of Share Series

Section 27(5) does not allow a corporation to designate shares in a series at the time of incorporation:

27(1) The articles may authorize the issue of any class of shares in one or more series and may authorize the directors to fix the number of shares in each series and to determine the designation, rights, privileges, restrictions and conditions attaching to the shares of each series, subject to the limitations set out in the articles. . .

(5) Before the issue of shares of a series authorized under this section, the directors shall send to the Registrar articles of amendment in the prescribed form to designate a series of shares.

> ***(6) On receipt of articles of amendment designating a series of shares, the Registrar shall issue a certificate of amendment in accordance with section 255.***

It must later file articles of amendment to make this designation. Should s. 27(5) be amended to permit this designation at the time of incorporation?

The concern is that directors will change the rights attached to a series of shares, without shareholder approval, which could prejudice shareholders. To permit a series to be designated upon incorporation does not increase the risk to shareholders. As long as the articles still have to be amended to change the series after incorporation, there is no apparent prejudice to shareholders. They will purchase the shares with full knowledge of their status and they can vote on any changes to the class of the shares.

An Industry Canada paper[10] that discussed this point supports permitting the series to be designated upon incorporation, as long as the articles must be amended to make changes thereafter. The Law Society also supports such an amendment, as long as the existence of the series and the conditions on the series are on the public record.

Questions for Feedback

12. ***Should the BCA be amended to treat canceled shares as sufficient consideration for new shares issued as part of a split? What is your suggestion for appropriate wording?***

13. ***How could the BCA address concerns that share splits that are not supported by consideration might skew voting and dividend rights? What is your suggestion for appropriate wording?***

14. ***What problems might arise if a series could be designated upon incorporation?***

V. Revival

A. General Revival (s. 201)

Section 201 allows a corporation to be revived such that it exists as though it was never dissolved:

> ***201(1) If a corporation is dissolved under this Part any interested person may apply to the Registrar to have the corporation revived.***
>
> ***(2) Articles of revival in the prescribed form and documents relating***

[10] Industry Canada, *Canada Business Corporations Act Supplement to Discussion Paper Proposals for Technical Amendments* (Ottawa: July 1996).

to corporate names that are prescribed by the regulations shall, unless otherwise provided by the Registrar, be sent to the Registrar.

(3) On receipt of articles of revival and the documents referred to in subsection (2), the Registrar shall issue a certificate of revival in accordance with section 255.

(4) A corporation is revived on the date shown in the certificate of revival and, subject to any reasonable terms that the Registrar may impose and to rights acquired by any person prior to the revival, the corporation is deemed to have continued in existence as if it had not been dissolved.

Currently, articles of revival must be filed with the Registrar and the annual returns of the corporation must be filed. Some practitioners have commented that it is too onerous to require the party who seeks to revive the corporation to file the annual returns on behalf of the corporation. Is this the case? Are there any other general concerns about s. 201?

There may also be a need to revive a corporation for a limited time or purpose. Upon the completion of the time or purpose, the corporation would automatically dissolve. Such a provision is in the *Company Act* but was not included in the BCA.

The Law Society explains that there is often a need to revive a company for a specific purpose, but not to recommence operations. For example, there may simply be a need to transfer assets that were held by the corporation. It is simpler to revive for a limited purpose and to allow the corporation to automatically dissolve than it is to revive and then dissolve again.

The Law Society paper highlights several considerations with regard to the implementation of such a provision. It proposes that the revival could be administered by the Registrar or on application to a court. It notes that there should be some sort of filing to evidence that the purpose for which the corporation was revived has been accomplished. The paper also suggests that the Act should leave room for discretion in the appointment of directors as they may be unnecessary or no one may be willing to act as director.

B. Continuation of Actions After Dissolution (s. 219)

Section 219 provides that an action taken by or against a corporation within two years of dissolution may be pursued:

219(1) In this section, "shareholder" includes the legal representatives of a shareholder.

(2) Notwithstanding the dissolution of a body corporate under this Act,

(a) a civil, criminal or administrative action or proceeding commenced by or against the body corporate before its dissolution may be continued as if the body corporate had

not been dissolved,

(b) a civil, criminal or administrative action or proceeding may be brought against the body corporate within 2 years after its dissolution as if the body corporate had not been dissolved, and
judgment or order if the body corporate had not been dissolved remains available for that purpose.

(3) Service of a document on a corporation after its dissolution may be effected by serving the document on a person shown in the last notice filed under section 101 or 108.

(4) Notwithstanding the dissolution of a body corporate under this Act, a shareholder to whom any of its property has been distributed in the liquidation is liable to any person claiming under subsection (2) to the extent of the amount received by that shareholder on the distribution, and an action to enforce that liability may be brought within 2 years after the date of the dissolution of the body corporate.

(5) The Court may order an action referred to in subsection (4) to be brought against the persons who were shareholders as a class, subject to any conditions the Court thinks fit and, if the plaintiff establishes his claim, the Court may refer the proceedings to a referee or other officer of the Court who may

(a) add as a party to the proceedings before him each person who was a shareholder found by the plaintiff,

(b) any property that would have been available to satisfy any
(b) determine, subject to subsection (4), the amount that each person who was a shareholder shall contribute towards satisfaction of the plaintiff's claim, and
direct payment of the amounts so determined.

The Law Society notes that under the *Company Act*, no action could be taken until the company was restored or revived. This is permitted by s. 219, but it is not apparent how a dissolved corporation could conduct litigation.

If a corporation is dissolved, it does not have any shareholders or directors. Since a corporation can only act through its shareholders or directors, a dissolved corporation could not instruct counsel or conduct litigation in any way. They recommend that s. 219 provide a mechanism to explain how the object of s. 219 could be carried out or require that the corporation be revived pursuant to s. 201.

Questions for Feedback

15. Is there a need to be able to revive for a limited purpose?

16. ***Are there any restrictions that should be placed on the use of a limited revival provision?***

17. ***Are there other considerations that should factor into a mechanism that will give effect to s. 219? What are your suggestions for the wording of this section?***

PART TWO- ADMINISTRATIVE AMENDMENTS

I. Shareholder Meetings outside Alberta (s. 126)

Section 126 permits shareholder meetings to be held outside Alberta:

> **126(1) Meetings of shareholders of a corporation shall be held at the place within Alberta provided in the by-laws or, in the absence of such provision, at the place within Alberta that the directors determine.**
>
> **(2) Notwithstanding subsection (1), a meeting of shareholders of a corporation may be held outside Alberta if all the shareholders entitled to vote at that meeting so agree, and a shareholder who attends a meeting of shareholders held outside Alberta is deemed to have so agreed except when he attends the meeting for the express purpose of objecting to the transaction of any business on the grounds that the meeting is not lawfully held.**
>
> **(3) A shareholder or any other person entitled to attend a meeting of shareholders may participate in the meeting by means of telephone or other communication facilities that permit all persons participating in the meeting to hear each other if**
>
> **(a) the by-laws so provide, or**
> **(b) subject to the by-laws, all the shareholders entitled to *vote at the meeting consent,***
>
> ***and a person participating in such a meeting by those means is deemed for the purposes of this Act to be present at the meeting.***
> ***(4) Notwithstanding subsections (1) and (2), if the articles so provide, meetings of shareholders may be held outside Alberta at one or more places specified in the articles***

It has been proposed that the provision be amended to provide additional flexibility in this regard. There are two apparent shortcomings of the current section.

First, the section does not specifically allow for unanimous shareholder agreements ("USA"). Subsection 126(2) allows a meeting to be held anywhere if all shareholders entitled to vote agree to this decision. It may be preferable to specify that a USA govern this decision so that the law relating to USAs will apply.

Second, it requires that the location of the meeting be designated in the articles. It may be desirable to give the corporation greater flexibility in making this decision. Several solutions have been suggested to address these concerns:

1) Repeal subsections 126(2) and 126(4). Amend subsection 126(1) to read: "Subject to the articles and any unanimous shareholder agreement, a meeting of shareholders of a corporation shall be held at such place in or outside Alberta as the directors determine or, in the absence of such a determination, at the place where the registered office of the corporation is located." (OBCA Approach)

2) Repeal subsection 126(4) and amend subsection 126(1) to begin "unless the articles or a unanimous shareholder agreement otherwise provide."

3) Amend subsection 126(4) to omit the phrase "at one or more places specified in the articles."

The Law Society proposed and supported the third option. They did express some concern that such an amendment may prejudice the rights of existing shareholders. A shareholder may not have purchased a share if they had known that meetings could be held in a location at which they could not attend. Should s. 126 be amended, notwithstanding this concern?

Question for Feedback

18. Are there other problems associated with such an amendment? If not, which of the above three options should be pursued? How should this section be worded?

II. Regulations Regarding Constrained Shares (s. 168(2))

Section 168(2) reads that a corporation "***may amend articles in accordance with the regulations to constrain the issue or transfer of shares***

There are no regulations. The Law Society suggested that s. 168(2) be amended to begin "subject to the regulations" in the event that there is ever a need to create regulations.

Questions for Feedback

19. Should the Law Society proposal be implemented? If not, are there alternative proposals?

20. Is there a need for regulations to constrain the issue or transfer of shares and how should any such regulation be worded?

III. Filing Court Orders (ss. 185(4) & 234(6))

Section 185(4) requires that articles of reorganization be filed but does not require a filing of the court order allowing for the reorganization:

> ***185(1) In this section, "order for reorganization" means an order of the Court made under***
>
> ***(a) section 234,***
>
> ***(b) the Bankruptcy and Insolvency Act (Canada) approving a proposal, or***
>
> ***(c) any other Act of the Parliament of Canada or an Act of the Legislature that affects the rights among the corporation, its shareholders and creditors.***
>
> ***(2) If a corporation is subject to an order for reorganization, its articles may be amended by the order to effect any change that might lawfully be made by an amendment under section 167. . .***
>
> ***(4) After an order for reorganization has been made, articles of reorganization in prescribed form shall be sent to the Registrar together with the documents required by sections 19 and 108, if applicable.***

Similarly, s. 234(6) allows the court to order that articles be amended but does not require the court order to be filed. It has been proposed that both of these sections be amended to require that the court order be filed with the Registrar before the order is executed. The Law Society supported this proposal in response to the 1995 discussion paper.

A new proposal would only require that details identifying the court order be filed with the Registrar. Interested parties could obtain the order from the Courts.

Question for Feedback

21. Should one of these proposals be implemented? If not, are there alternative proposals? How should this section be worded?

IV. Deemed Receipt Rule (s. 247(2))

This section provides that notice to a corporation is deemed to be received at the time of delivery:

> ***247(1) A notice or document required or permitted to be sent to or served on a corporation may be . . .***
>
> ***(2) A notice or document sent by registered mail to the corporation in accordance with subsection (1)(b) or a notice sent by ordinary mail to the corporation in accordance with subsection (1.1) is deemed to be received or***
>
> ***served at the time it would be delivered in the ordinary course of mail***

unless there are reasonable grounds for believing that the corporation did not receive the notice or document at that time or at all.

It is proposed that an exception be made to this rule for the Registrar's notice of intent to dissolve. The section would be amended to provide that the notice would be deemed to be received even if it is returned as undeliverable. This often occurs with inoperative businesses that are no longer at their prior address. It is important that the Registrar be able to dissolve corporations so that the Registrar's records are accurate. The Law Society agrees with this position.

Question for Feedback

22. ***Should this proposal be implemented? If not, are there alternative proposals?***

V. Notice of Derivative Action Application (s. 232(2)(a))

This section requires that one give notice to all directors of a corporation on behalf of which one seeks leave to commence a derivative action:

> *232(1) Subject to subsection (2), a complainant may apply to the Court for leave to*
>
> *(a) bring an action in the name and on behalf of a corporation or any of its subsidiaries, or*
>
> *(b) intervene in an action to which a corporation or any of its subsidiaries is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the corporation or subsidiary.*
>
> *(2) No leave may be granted under subsection (1) unless the Court is satisfied that*
>
> *(a) the complainant has given reasonable notice to the directors of the corporation or its subsidiary of his intention to apply to the Court under subsection (1) if the directors of the corporation or its subsidiary do not bring, diligently prosecute, defend or discontinue the action . . .*

It is proposed that this notice requirement be eliminated where the directors of the corporation are all defendants in the derivative action.

The Law Society agrees with this position. However, the concern was raised that this amendment might encourage plaintiffs to take action against all directors.

Question for Feedback

23. ***Should this proposal be implemented? If not, are there alternative proposals?***